No. 76-1849



# In the Supreme Court of the United States

OCTOBER TERM, 1977

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MULTI-MEDICAL CONVALESCENT AND NURSING CENTER OF TOWSON, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 550 F. 2d 974. The decision and order of the National Labor Relations Board (Pet. App. 8a-50a) are reported at 225 NLRB No. 56.

## JURISDICTION

The judgment of the court of appeals was entered on February 24, 1977, and a petition for rehearing *en banc* was denied on March 28, 1977 (Pet. 2). The petition for a writ of certiorari was filed on June 24, 1977.[1] The

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[1]On April 21, 1977, the Chief Justice denied petitioner's motion for stay of mandate pending the disposition of the petition for certiorari.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board properly concluded that union agents did not misrepresent the purpose of cards signed by a majority of employees designating the union as the collective bargaining representative.

2. Whether the Board properly issued a bargaining order to remedy petitioner's unfair labor practices directed at destroying the union's majority, notwithstanding employee turnover following the commission of the unfair labor practices.

3. Whether the Administrative Law Judge's exclusion of certain evidence denied petitioner due process of law.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.



## STATEMENT

The Board found that, in early 1975, in response to the Union's[2] organizational campaign, petitioner violated Section 8(a)(1) of the Act by threatening employees with layoffs if they selected the Union as their representative, by coercively interrogating employees about their union activities, and by spying on the employees' union activities (Pet. App. 8a-9a, 17a-28a, 43a). The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging union activist Wilma Peay two weeks before the Board election, and by discharging union activist Vera Owens when the Union's objections to its loss of the election were still pending (Pet. App. 8a-9a, 16a, 28a-40a). Finally, the Board found that the Union had valid authorization cards from a majority of the employees in an appropriate unit and that petitioner's unfair labor practices were so serious that a fair rerun election could not be held. Accordingly, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the majority representative, and that a bargaining order was an appropriate remedy (Pet. App. 9a-10a, 40a-43a). The court of appeals enforced the Board's decision and order in its entirety (Pet. App. 1a-7a).

## ARGUMENT

1. Petitioner is incorrect in contending (Pet. 4-6) that the Board and the court below departed from *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, in counting two authorization cards clearly designating the Union as collective bargaining representative, where the signers were told by the Union agent that the

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[2]District 1119E, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

cards would be used to help the Union get an election. As this Court stated in *Gissel Packing, supra,* 395 U.S. at 606-607, "There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him the card will probably be used first to get an election." *Gissel Packing* approved the Board's *Cumberland Shoe Corp.* doctrine, 144 NLRB 1268, under which authorization cards, such as those here, designating the union as bargaining representative are counted "unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election." 395 U.S. at 584, 606; emphasis supplied. Union representations that the cards would be used to obtain an election do not suffice to "deliberately and clearly" cancel the language of the cards (*id.* at 606), which authorizes the Union to act as the bargaining representative.[3]

2. There is no merit in petitioner's contention (Pet. 7-9) that the Board must be bound by employee turnover in determining the appropriateness of a bargaining order. For the Board to withhold its bargaining order remedy because of turnover occurring after the employer's unfair labor practices "would in effect be rewarding the employer and allowing him to 'profit from [his] own wrongful refusal to bargain.'" *National Labor Relations Board* v. *Gissel Packing Co., supra,* 395 U.S. at 610, quoting from *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 704. Accord: *National Labor*

[3]Contrary to petitioner's contention (Pet. 6), *National Labor Relations Board* v. *South Bay Daily Breeze,* 415 F. 2d 360 (C.A. 9), and *Fort Smith Outerwear, Inc.* v. *National Labor Relations Board,* 499 F. 2d 223 (C.A. 8), are not in conflict with the decision below. In each of those cases, the court applied the *Gissel Packing-Cumberland* rule to the facts before it.



*Relations Board* v. *Lou De Young's Market Basket, Inc.,* 430 F. 2d 912, 915 (C.A. 6); *National Labor Relations Board* v. *L. B. Foster Co.,* 418 F. 2d 1 (C.A. 9), certiorari denied, 397 U.S. 990.

The propriety of the Board's bargaining order here is not undermined by the cases cited by petitioner (Pet. 7-9). In *National Labor Relations Board* v. *General Stencils, Inc.,* 472 F. 2d 170, 173-175 and n. 5 (C.A. 2), and *Peerless of America, Inc.* v. *National Labor Relations Board,* 484 F. 2d 1108, 1118-1121 (C.A. 7), the courts found that the unfair labor practices were not sufficiently serious to preclude a second election; they relied on turnover merely to reinforce the conclusion not to enforce the bargaining order. *National Labor Relations Board* v. *American Cable Systems, Inc.,* 427 F. 2d 446 (C.A. 5), certiorari denied, 400 U.S. 957, was returned to the Board for reconsideration in light of the intervening decision in *Gissel;* the court simply held that, "at the time the Board reconsidered the propriety of a bargaining order on remand under *Gissel* standards, it was required to consider the then existing situation at the company to determine whether a fair election was still improbable." *J.P. Stevens & Co., Inc.* v. *National Labor Relations Board,* 441 F. 2d 514, 525, n. 16 (C.A. 5), certiorari denied, 404 U.S. U.S. 830. Finally, in *National Labor Relations Board* v. *Ship Shape Maintenance Co., Inc.,* 474 F. 2d 434 (C.A. D.C.), the court expressly recognized that normal employee turnover is not a ground for refusing to enforce an otherwise valid bargaining order, but declined to affirm the bargaining order in that particular case because of the "extraordinary rate of turnover indigenous to the Company's * * * operations" (*id.* 443), and the complete absence of "overt anti-union animus" accompanying the company's unfair labor practices (*id.* at 442).

3. Nor is there merit to petitioner's contention (Pet. 9-10) that it was denied due process by the Administrative Law Judge's refusal to permit it to adduce evidence which tended to impeach the credibility of certain witnesses and which showed turnover in the bargaining unit.[4] As shown, the evidence on turnover is legally irrelevant. Moreover, the Board and the court below concluded (Pet. App. 3a-6a, 8a-9a, n. 1), after a careful review of the record, that the exclusion of the other evidence was not prejudicial to petitioner. The Administrative Law Judge's resolution of these evidentiary questions does not present an issue warranting further review.

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[4]The witnesses to whom petitioner apparently refers were employees Connor and Owens. Before the Board, petitioner objected that it should have been allowed to show that Connor left his position with petitioner under circumstances different from those to which he testified. Relying on the principle that a trier of fact is entitled to discredit a portion of a witness' testimony without discrediting the witness generally (see *Pioneer Drilling Co.*, v. *National Labor Relations Board*, 319 F. 2d 961, 964, n. 3 (C.A. 10)), the Board correctly held that, even had the judge rejected Connor's explanation for leaving, he was nonetheless entitled to credit Connor's testimony that he was solicited by petitioner to engage in unlawful surveillance (Pet. App 9a). Petitioner also objected to the exclusion of evidence that Owens filed a charge with the Equal Employment Opportunity Commission in connection with her discharge, contending that a violation of Title VII of the Civil Rights Act of 1964 was inconsistent with a violation of the NLRA. (Exceptions to Administrative Law Judge's decision. p. 4.) However such evidence is irrelevant; the fact that a discharge was motivated by consideration which violate Title VII does not negate the possibility that it was also motivated by considerations which violate the NLRA.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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